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Public Prosecutor v Tiong Wee Kiet

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(LB)-67–02 OF 2017
TENGKU MAIMUN, YAACOB MD SAM AND ZABARIAH YUSOF JJCA
17 APRIL 2018

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Criminal Procedure — Appeal — Appeal against acquittal and discharge — Appeal by prosecution — Accused stopped by police during crime prevention patrol — Accused led police to house — Drugs found in house — Whether police had information on drugs before arresting accused — Whether police administered cautioned statement to accused person — Whether acquittal and discharge of accused person safe — Dangerous Drugs Act 1952

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The accused was charged with four charges under the Dangerous Drugs Act 1952 ('the DDA'). The prosecution's case was that on or about 10 December 2014, a police party from the anti-narcotics section of the Criminal Investigation Department led by PW3, was on a crime prevention patrol at Farley Commercial Area, Jalan Salim, Sibu, Sarawak. While on patrol, they spotted a tinted silver-coloured car, which they viewed as being 'suspicious'. The said car stopped in front of Farley Bakery and one the accused was seen alighting from the car. PW3 stopped the accused, detained him, and introduced himself as police. PW3 said he administered caution to the accused, after which PW3 asked the accused whether he had kept any incriminating items to which the accused said 'Yes'. Then the accused, allegedly on his own accord, drove his car with PW3 and led the police team to a house. Upon reaching the house, the accused opened the house using the key which was with him and brought PW3 and his team into one of the rooms upstairs. After the door of the room was opened, PW3 read the caution again to the accused. PW3 asked the accused whether he kept any incriminating items to which the accused answered 'Yes'. The accused then proceeded to open one of the drawers of a cupboard in the room using the key which was with him and took out one black plastic bag and handed it over to PW3 who opened it and found items believed to be dangerous drugs. Then the accused took out one iPad mini box and handed it to PW3 who opened it and also found to contain items believed to be dangerous drugs. These items were seized. Having found that the prosecution had made out a prima facie case against the accused on all four charges, the accused was ordered to enter his defence. At the end of the defence case, the trial judge held that the defence had raised a reasonable doubt on the prosecution's case and acquitted and discharged the accused on all the charges. Hence, the present appeal by the prosecution.

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Held, dismissing the appeal:

(1) The evidence of the conduct of the accused in leading the police to the Lorong Lada house and taking out the drugs from the drawer and showing them to the police officer would be inadmissible. There was no evidence of what caution was read and from where it was read. There was also no evidence of the exact words of the caution, and neither was there evidence that the caution was explained and if explained, what was the explanation like. A mere reading of the caution would not be sufficient. The consequences of the caution must be explained to the accused as the implication of the answers given after the caution was read was very crucial and could incriminate the accused person (see paras 39(b) & 40(b)).

(2) The prosecution relied heavily on the evidence of PW3 and PW5 which was riddled with contradictions and inconsistencies, to support its case of information provided by the accused that led to the discovery of the drugs. The evidence suggested that the police had prior knowledge and information and acted on such information prior to them arriving at Farley Commercial Area and targeted the accused. This could not be regarded as facts discovered under s 27 of the Evidence Act 1950 ('the EA'). Even if the fact was within the prior knowledge of the police from other sources and when the same information was received again from the accused with the object of making his statement admissible, it could not be discovery of fact. Section 27 of the EA was not applicable (see paras 49–50).

(3) The trial judge did not err when she found that the prosecution had failed to prove that the accused had exclusive possession of the drugs found in the room given the fact that others had access to the room and the drawer at any time. The key to the room in Lorong Lada house was not kept by the accused. The spare keys to the room and the drawer where the drugs were found were accessible to all members of PW4's family. There was doubt that only the accused had access to the keys. Furthermore, the accused and his wife did not stay in that room and therefore, the accused did not have control of the room, least of all, custody and control of whatever was in the drawer (see paras 51 & 53–54).

[Bahasa Malaysia summary

Tertuduh dipertuduh dengan empat pertuduhan di bawah Akta Dadah Berbahaya 1952 ('ADB'). Kes pendakwaan adalah pada 10 Disember 2014, sepasukan polis dari bahagian anti-narkotik Jabatan Siasatan Jenayah yang diketuai oleh PW3, melakukan rondaan pencegahan jenayah di Kawasan Perdagangan Farley, Jalan Salim, Sibu, Sarawak. Semasa rondaan, mereka melihat sebuah kereta berwarna perak bercermin gelap, yang dianggap 'mencurigakan'. Kereta tersebut berhenti di hadapan Farley Bakery dan

tertuduh dilihat turun dari kereta. PW3 menahan tertuduh dan memperkenalkan dirinya sebagai polis. PW3 berkata dia ada memberi amaran kepada tertuduh, dan selepas itu PW3 bertanya kepada tertuduh sama ada dia menyimpan apa-apa bahan salah dan tertuduh mengatakan 'Ya'. Seterusnya, tertuduh, dengan sendirinya, memandu kereta dengan PW3 dan membawa pasukan polis ke sebuah rumah. Apabila tiba di rumah, tertuduh membuka rumah tersebut menggunakan kunci yang ada padanya dan membawa PW3 dan pasukannya ke salah sebuah bilik di tingkat atas. Selepas pintu bilik dibuka, PW3 membacakan pernyataan beramaran sekali lagi kepada tertuduh. PW3 bertanya kepada tertuduh sama ada dia menyimpan apa-apa barang salah yang mana tertuduh menjawab 'Ya'. Tertuduh kemudiannya membuka salah satu laci almari di dalam bilik menggunakan kunci yang ada padanya dan mengeluarkan satu beg plastik hitam dan menyerahkannya kepada PW3 yang membukanya dan menemui barang yang dipercayai dadah berbahaya. Tertuduh kemudian mengeluarkan satu kotak iPad Mini dan menyerahkannya kepada PW3 yang membuka dan juga mendapatinya mengandungi bahan yang dipercayai dadah berbahaya. Barang-barang ini dirampas. Setelah mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh atas keempat-empat pertuduhan, tertuduh diperintahkan membela dirinya. Pada akhir kes pembelaan, hakim bicara berpendapat bahawa pembelaan telah menimbulkan keraguan munasabah terhadap kes pendakwaan dan membebaskan dan melepaskan tertuduh atas semua pertuduhan. Oleh itu, rayuan ini oleh pihak pendakwaan.

Diputuskan, menolak rayuan:

(1) Keterangan tindakan tertuduh yang membawa pihak polis ke rumah di Lorong Lada dan mengeluarkan dadah dari laci dan seterusnya menunjukkan kepada pegawai polis itu tidak boleh diterima. Tidak ada keterangan tentang apakah amaran yang telah dibaca dan dari mana ia dibaca. Tidak ada keterangan tentang perkataan-perkataan yang tepat, dan tidak terdapat keterangan bahawa amaran ini dijelaskan dan jika dijelaskan, bagaimanakah penjelasannya. Bacaan amaran semata-mata tidak mencukupi. Akibat amaran harus dijelaskan kepada tertuduh sebagai implikasi dari jawapan yang diberikan setelah amaran dibaca sangat penting dan boleh mensabitkan orang yang dituduh (lihat perenggan 39(b) & 40(b)).

(2) Pihak pendakwaan terlalu bergantung pada keterangan PW3 dan PW5 yang penuh dengan percanggahan dan ketidakkonsistenan, untuk menyokong maklumat kes yang diberi oleh tertuduh yang membawa kepada penemuan dadah. Bukti menunjukkan bahawa polis mempunyai pengetahuan dan maklumat yang terdahulu dan bertindak berdasarkan maklumat sedemikian sebelum mereka tiba di Kawasan Perdagangan Farley dan menjadikan tertuduh sasaran mereka. Ini tidak boleh dianggap sebagai fakta yang ditemui bawah s 27 Akta Keterangan 1950

('AK'). Sekalipun fakta itu berada di dalam pengetahuan terdahulu polis dari sumber lain dan apabila maklumat yang sama diterima lagi dari tertuduh dengan tujuan membuat kenyataannya dapat diterima, ia bukanlah fakta yang ditemui. Seksyen 27 AK tidak terpakai (lihat perenggan 49–50).

(3) Hakim bicara tidak terkhilaf apabila dia mendapati bahawa pihak pendakwaan gagal membuktikan bahawa tertuduh mempunyai milikan eksklusif terhadap dadah yang terdapat di dalam bilik kerana fakta bahawa orang lain juga mempunyai akses terhadap bilik dan laci tersebut pada bila-bila masa. Kunci bilik di rumah Lorong Lada tidak disimpan oleh tertuduh. Kekunci ganti bilik dan laci di mana dadah ditemui boleh diakses oleh semua anggota keluarga PW4. Terdapat keraguan bahawa hanya tertuduh mempunyai akses terhadap kunci. Selain itu, tertuduh dan isterinya tidak tinggal di dalam bilik tersebut dan oleh itu, tertuduh tidak mempunyai kawalan atas bilik tersebut, paling tidak, jagaan dan kawalan apa-apa sahaja yang terdapat di dalam laci tersebut (lihat perenggan 51 & 53–54).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Ngu Chee Wui v PP [2016] 6 MLJevi 190; [2015] 9 CLJ 562, CA (refd)
PP v Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 652, HC (refd)
Pulukuri Kottaya v Emperor AIR 1947 PC 67 (refd)
Y Jeyamuraly a/l Yesiah v Public Prosecutor [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), (3), 37(da), 37A, 37A(1)(b), (1)(r), 39B(1)(a), (2)
Evidence Act 1950 ss 8, 9, 27

Appeal from: Criminal Trial Nos SBW-45–7/4 of 2015, SBW-45–8/4 of 2015, SBW-45–10/6 of 2015 and SBW-45–11/8 of 2018 (High Court, Sibu)

Mohd Taufik bin Mohd @ Mohd Yusoff (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Augustine Liom (Tang & Co) for the respondent.

Zabariah Yusof JCA:

[1] The accused, Tiong Wee Kiet was charged with four charges under the Dangerous Drugs Act 1952 ('the DDA').

[2] The first and the second charges are for trafficking in a dangerous drug, to wit 73.02g of 3,4-methylenedioxymethamphetamine (MDMA) and 189.6g of ketamine, respectively. Both of these offences are under s 39B(1)(a) of the DDA and carry the mandatory death sentence under s 39B(2) of the same.

[3] The third charge is for possession of a dangerous drug, to wit 12.38g of methamphetamine which is an offence under s 12(2) of the Act and punishable under s 39A(1)(r) of the same.

[4] The fourth charge is for possession of a dangerous drug, to wit 9.8g of nimetazepam which is an offence under s 12(2) of the Act and punishable under s 12(3) of the same.

[5] These four offences were alleged to have been committed in a room at a house bearing the address at No 3B, Lorong Lada 14A, Sibu, Sarawak on 10 December 2014 at about 8.10pm.

[6] At the end of the prosecution's case, the learned trial judge ruled that the prosecution had made out a prima facie case against the accused on all four charges. The accused was ordered to enter his defence. The accused elected to give evidence under oath and called one other witness to support his case. At the conclusion of the defence's case, the learned trial judge found that the defence had raised reasonable doubt on the prosecution's case and acquitted and discharged the accused on all the charges.

[7] The prosecution appealed on the order of acquittal and discharge of the accused, which is the appeal before us.

[8] We have perused the records of appeal and heard submissions from both parties. We find no merits in the appeal. Unanimously, we dismiss the appeal and affirm the decision of the learned trial judge in the acquittal and discharge of the accused. Herein are our grounds for doing so.

BACKGROUND:

[9] The prosecution's case is that on or about 10 December 2014 at about 8.10pm, a police party from the anti-narcotics section of the Criminal Investigation Department, Sibu led by Inspector Tengku Mohd Faisal (PW3)

was on a crime prevention patrol at Farley Commercial Area, Jalan Salim, Sibu, Sarawak. While on patrol, they spotted a tinted silver coloured Toyota Vios car, which they viewed as being 'suspicious'. The said car stopped in front of Farley Bakery and one Chinese man ('the accused') was seen alighting from the car. He went to the bakery. His wife and young son remained in the car.

[10] PW3 stopped the accused, detained him, and introduced himself as police. At that time, the accused looked shocked and tried to turn his body as though to run away but Corporal Man (PW5) managed to detain and control him. PW3 said he administered caution to the accused, after which PW3 asked the accused whether he had kept any incriminating items to which the accused said 'Yes'. Then the accused, allegedly on his own accord, drove his car with PW3 and led the police team to a house at No 3B, Lorong Lada 14A, Sibu, the address of which is stated in the charges.

[11] Upon reaching the address, the accused opened the house using the key which was with him and brought PW3 and his team into one of the room upstairs. After the door of the room was opened, PW3 read the caution again to the accused. PW3 asked the accused whether he kept any incriminating items to which the accused answered 'Yes'. The accused then proceeded to open one of the drawers of a cupboard in the room using the key which was with him and took out one black plastic bag and handed it over to PW3 who opened it and found items believed to be dangerous drugs. Then the accused took out one iPad mini box and handed it to PW3 who opened it and also found to contain items believed to be dangerous drugs. These items were seized.

[12] PW3 then brought the accused together with the seized items to Sungai Merah Police Station. PW3 weighed and marked the items that was seized and prepared a search list.

[13] The seized items were subsequently handed over to the Investigating Officer (PW6) who then put into envelopes marked as E1, E2, E3 and E4. These envelopes were handed over to the Chemist (PW2) to be analysed. The envelopes marked as E1, E2, E3 and E4 were later marked as court exhs P6, P18, P25 and P29.

[14] PW2 confirmed that:

(i) the total weight of the drugs MDMA in envelope marked E1 (P6) was 72.02g (first charge);

(ii) the total weight of the drug methamphetamine found in envelope E2 was 10.79g (amended from 12.38g as stated in the grounds of the learned trial judge (third charge);

(iii) the total weight of the drug nimetazepam found in envelope E3 was 9.8g (fourth charge); and

(iv) the total weight of the drug ketamine found in envelope E4 was 189.6g (second charge).

ARGUMENTS BY THE PROSECUTION

[15] The prosecution submitted that possession of the drugs was proven premised on the following:

(a) the discovery of the impugned drug was based on the information given by the accused. PW3 said that the information was given after PW3 administered caution under s 37A(1)(b) of the DDA to the accused. The information given by the accused led the police to the room at Lorong Lada where the drugs were found. Therefore, whatever information given by the accused after caution was administered is admissible and relevant;

(b) alternatively, in the event the court is not with the prosecution on (i) above, the discovery of the drugs was in consequence of information received from the accused and it was admissible and relevant under s 27 of the Evidence Act 1950 ('the EA');

(c) premised on the conduct and manner of the accused in leading the police to the house at Lorong Lada and opening of the drawer with the key in possession of the accused, in which the drugs were hidden in the drawer, the accused was proven to have the knowledge, custody and control of the drugs. Possession is thus proven against the accused. As the accused's conduct is admissible under s 8 of the EA, the onus is on the accused to explain his conduct pursuant to s 9 of the same;

(d) on the charges for 'trafficking', the prosecution relies on the presumption of trafficking under s 37(da) of the DDA for the first charge. As for the second charge the prosecution relies on the acts of 'keeping', 'concealing', 'giving', 'receiving' and 'carrying' which is within the definition of 'trafficking' under s 2 of the DDA. These acts, in addition to the quantity and different types of drugs found, the recovery of the transparent plastic packets of varying sizes, the fact it was bound by rubber bands and the quantity of rubber bands found, infer that the acts amount to 'keeping' and 'concealing' the drugs ie ketamine for the purposes of sale to others.

ARGUMENT BY THE DEFENCE

[16] There was no evidence that the caution under s 37A(1)(b) of the DDA was administered and explained to the accused. In the absence of such

A evidence, any subsequent acts or statements of the accused which led to the discovery of the drugs is inadmissible.

[17] The room where the drugs were found was accessible to all other members of the wife's family. The prosecution failed to prove exclusive B possession, custody and control of the drugs by the accused. In any event, the accused does not stay at the room at Lorong Lada, although occasionally he does come to stay once a week or fortnightly in the said room. The spare key to the room and the drawer were placed in a common area where it is accessible to other members of the wife's family. C

[18] PW3 and PW5 are not credible witnesses. Their evidence was tailored and fabricated to implicate the accused to ensure that his statement and acts are admissible and for s 27 of the EA to be applicable. There were major and serious D discrepancies and contradictions in their evidence. Hence there is grave doubts as to whether the accused did give information to the police that led to the discovery of the drugs that is the subject of the charges. The evidence suggests that the accused had been targeted from the very beginning and the police already had information of the existence of the drugs at the house in Lorong E Lada, before meeting with the accused, hence negativing the applicability of s 27 of the EA.

FINDINGS OF THE LEARNED TRIAL JUDGE

F *At the end of the prosecution's case*

[19] The learned trial judge finds that the prosecution failed to prove that the caution under s 37A(1)(b) of the DDA was administered to the accused. PW3 failed to state in his report in P3 that he had done so before he asked the accused G whether he had kept any incriminating substances or items. As a result, the learned trial judge was unable to determine whether the caution, if at all was administered, was proper and conform to the prescribed form as found in s 37A(1)(b) of the DDA.

H **[20]** The learned trial judge, however agreed with the prosecution that the statement and conduct of the accused in this case which led to the discovery of the drugs, is admissible under s 27 of the EA.

[21] It is also the findings of the learned trial judge that the conduct of the I accused is relevant and admissible under s 8 of the EA. Hence, pursuant to s 9 of the EA, it is for the accused to explain why he did what he did.

[22] Although the learned trial judge agreed with the defence that there were inconsistencies in the evidence of PW3 and PW5, but she was of the view that

the inconsistencies were not on the core issues such as the presence of PW3 at the Farley Commercial Area or on the information given by the accused that he had incriminating items.

[23] On the issue of exclusive possession, the learned trial judge finds that the door of the room as well as the drawer where the dangerous drugs were found, were locked on arrival of the police team and the accused opened them using his key which were all along in his possession.

[24] Hence, the learned trial judge finds that the accused had knowledge of the drugs in the drawer and had exclusive power to deal with the drugs to the exclusion of the others in the house. The drugs were discovered as a result of the information given by the accused and his conduct leading to the discovery of the drugs was sufficient to prove that the accused was in possession of the same.

[25] The prosecution had proven all the elements in all the four charges. As such the learned trial judge finds that a prima facie case had been made out against the accused. The accused was then called to enter his defence to the four charges.

[26] In her grounds, the learned trial judge finds that in the midst of her writing her grounds she finds that there is a discrepancy between the weight of methamphetamine as stated in the third charge which is 12.38g and the weight given by PW2 in court. This has escaped her attention and so were the prosecution and the learned defence counsel. However, she finds that there is no miscarriage of justice to amend the third charge in respect of the weight of methamphetamine from 12.38g to 10.79g as the weight is still more than 5g for an offence punishable under s 39A(1)(r) of the DDA.

At the defence stage

[27] The accused and another witness gave evidence for the defence.

[28] At the material time, the accused lived at his mother's house at Jalan Pipit, together with his wife and his young son.

[29] On 10 December 2013 at about 7.15pm, he, together with his wife and son went to Farley Commercial Area in Sibu to buy bread and to deposit some money at Maybank. After coming out from the bakery, someone stopped him and showed his identification as police. Then the accused saw PW5, known as Corporal Man. PW5 did a body search on him but found no incriminating items. There were other police personnel who conducted a search in his car but also found nothing incriminating.

A **[30]** At that time, the accused's handphone started ringing, however before he could answer the phone, it was snatched by PW5. The accused was subsequently handcuffed by PW5 and he was told to sit at the back seat of his car.

B **[31]** PW5 and one Corporal Philip asked the accused's wife to drive the car back to the accused's house. The accused testified that at that time there was no other police personnel other than PW5, Corporal Philip and Corporal Fareda. The accused also confirmed that at the material time, there was only one police car ie the Preve and not two. This evidence is in direct contrast to the evidence C given by PW3 and PW5.

[32] The accused asserted that PW3 was never at the Farley Commercial Area and he was never cautioned by PW3 as claimed. The accused denied that D he had given the answer 'Yes' to the question whether he had any incriminating items, whether at the Farley Commercial Area or at Lorong Lada house. The accused also denied that he attempted to run away, ie an account in direct contrast to PW3. The accused said at that time he was not afraid as he had not done anything wrong and a check by the police on his body and his car found E nothing incriminating.

[33] Whilst driving from Farley Commercial Area as instructed by PW5, instead of driving to the accused's mother's house at Jalan Pipit (where the accused and his wife was staying at the material time), PW5 asked the accused's F wife to drive them to the accused's father-in-law's house at Lorong Lada. Upon arrival at his father-in-law's house, the accused saw a white coloured Viva car parked in front of the house. Three men alighted from the car and one of them was later identified as PW3.

G **[34]** Upon going into the accused's father-in-law's house (which was not locked), his brother-in-law and sister-in-law were watching television. PW3 asked the accused to show his room to which the accused obliged. However, the accused in his testimony said that he only used that room whenever he visited his in-laws. The last time he used that room was about two weeks before the H incident. His wife sometimes went there without him.

[35] The police entered the room after being opened by the accused using his wife's key (which was obtained earlier by PW3 from the accused's wife and passed to the accused before he entered the house) and they proceeded to I conduct a search. PW3 discovered the drawer and asked the accused to open it using the key passed to him earlier by his wife. The accused denied that a caution was ever administered to him prior to him opening the drawer. He also denied answering 'Yes' to the question whether he had kept any incriminating items.

[36] PW3 asked the accused to take out the items from the drawer when later it was discovered that they were drugs. The accused said that he was shocked as he never kept any of such items there and did not know of its existence.

[37] PW3 asked the accused to admit or else his wife and son would be in trouble. The accused panicked and offered to settle the matter as he suspected that the drugs belonged to his wife's family members and would not like to see them in trouble.

FINDINGS AT THE END OF THE DEFENCE CASE

[38] At the end of the defence case, the learned trial judge held that the defence has raised a reasonable doubt on the prosecution's case for the following reasons:

(a) it is highly unlikely that the police stumbled upon the accused's car at Farley Commercial Area which was driven in a 'suspicious' manner due to it being heavily tinted. Stopping the accused had nothing to do with the car being tinted. PW5 could not provide an explanation as to why they viewed the accused's car as 'suspicious' at the material time, apart from it being heavily tinted. The very unsatisfactory explanation of PW3 and PW5 supports the story of the accused that his car was targeted and it was for that reason that PW5 stopped the accused and checked his body and the car. The learned trial judge said that reasonable doubt was raised against the prosecution's story that it was a chance meeting with the accused;

(b) the learned trial judge disbelieved PW3 that the accused attempted to escape when he was apprehended by the police. It was her findings that PW3 was never at the Farley Commercial Area when they accosted the accused. The non-committal and evasive answers of PW3 when he said 'I am not sure' and 'I cannot remember' to questions put to him as to what happened in Farley Commercial Area points to the fact that in all probability PW3 was never at Farley Commercial Area at the material time;

(c) the evidence of PW 4, the accused's father-in-law, shows that the accused was not in exclusive possession of the room in which the drugs were found. It was accessible to other members of the family of the wife. The accused does not stay at the said room but only stay in the room once a week or once a fortnight. The spare key to the room and the drawer were placed at the cabinet or chest at the landing or common area of the house and was accessible to anyone in the house. There was also another bunch of keys ie exh D1 which was able to open the drawer as shown during cross-examination of PW5 who succeeded in opening the drawer in full view of the court; and

(d) the learned trial judge finds that the evidence of the defence, when considered in totality with the evidence adduced by the prosecution, raised a reasonable doubt on the case of the prosecution. Hence the accused was acquitted and discharged at the end of the defence case.

OUR DECISION

[39] Essentially the issues to be determined are:

(a) whether PW3 had administered caution under s 37A(1)(b) of the DDA to the accused so as to render any subsequent acts and statements by the accused made to the police admissible (the caution);

(b) whether the accused gave information to the police which led to the discovery of the drugs at Lorong Lada, hence the applicability of s 27 of the EA;

(c) the credibility of PW3 and PW5;

(d) whether the accused had custody and control of the drugs found at Lorong Lada house (issue on possession).

[40] *The caution:*

(a) the learned trial judge rejected the evidence of PW3 and PW5 that a caution under s 37A(1)(b) of the DDA had been administered on the accused;

(b) we find that the learned trial judge did not err in this respect given that there was no evidence of what caution was read and from where it was read. There was no evidence of the exact words of the caution, and neither was there evidence that the caution was explained and if explained, what was the explanation like (refer to *Ngu Chee Wui v Public Prosecutor* [2016] 6 MLJevi 190; [2015] 9 CLJ 562). A mere reading of the caution would not be sufficient. The consequences of the caution must be explained to the accused as the implication of the answers given after the caution is read is very crucial and can incriminate the accused person (refer to *Public Prosecutor v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652).

The caution is to alert the accused that he has the right to remain silent. Hence, the rationale for the caution to be properly read and administered using the words which would be properly understood by the accused person. Actions subsequent to a caution being administered constitutes as a statement. Courts have accepted that a conduct can amount to a statement under s 37A. In *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605, this court held that 'actions such as pointing or nodding or handing over physically an item

in respond to a question or request are statements within the contemplation of s 37A of the Act ...'. A

The evidence of PW3 in relation to the caution which was allegedly read at Farley Commercial Area is as follows:

> D/C Man detained the subject and he managed to control the subject. I read the caution to the subject. After I read the caution, I asked the subject whether he did keep any incriminating item and the subject answered 'yes'. B

After the caution was allegedly read to the accused, PW3 said that the accused brought the police to the Lorong Lada house. Subsequently, at Lorong Lada house, immediately before the accused picked up the exhibits from the drawer in the room, the evidence of PW3 is as follows: C

> Subject opened the door of one of the rooms upstairs using the key that was held by him. He opened the door to that room. After the door was opened, I read the caution once again to the subject and asking him whether he did keep any incriminating item. And the subject answered 'yes' and opened a drawer of a cupboard using the key that was kept with him. D

Thus, premised on the evidence of PW3 and the similar evidence of PW5, the accused's action in picking up the drugs was consequent to PW3 allegedly reading the caution and then asking whether he kept any incriminating items. If what PW3 said is true that a caution was read to the accused, then whatever actions of the accused in leading the police to the Lorong Lada house and the picking up of the drugs from the drawer would be relevant and admissible. E F

However, in our present case, there is no evidence that such proper caution had been administered. Hence the evidence of the conduct of the accused in leading the police to the Lorong Lada house and taking out the drugs from the drawer and showing them to the police officer would be inadmissible. G

Therefore, the learned trial judge did not err when she finds that in the absence of the caution being administered to the accused by PW3, there was no admissible evidence of the conduct of the accused in picking up the drugs from the drawer as claimed. H

Section 27 of the Evidence Act 1950

[41] Section 27 of the EA is an alternative argument by the prosecution in the event that the court is not with them that a caution was administered on the accused. I

[42] The condition necessary to bring s 27 of the EA into operation is:

A (a) discovery of a fact in consequence of some information received from a person accused of any offence; and

(b) the person is in custody of a police officer.

B Any statement made by an individual in custody of police officer that lead to discovery of a fact that is relevant to the crime is admissible and it is evidence against that individual only. A fact previously discovered by the police from other sources cannot be regarded as discovered when the same information is received again from the accused with the object of making his statement C admissible. Any statement (that leads to discovery of a fact) in order to be admissible must be made before and not after the discovery. The fact discovered includes not only the object found but also the place where it lay and the accused's knowledge as to the place (refer to *Pulukuri Kottaya v Emperor* AIR 1947 PC 67.

D

[43] It is the prosecution's case that it was the accused who led the police to the house at Lorong Lada and it was the accused who took out the exhibits from the drawer and handed them over to the police.

E

[44] However, the issue on whether s 27 of the EA is applicable to our present case, hinges on whether the accused did give information to the police which leads to the discovery of the drugs. The facts of the present case need to be looked at, in its entirety. This relates to the credibility of the story of the F prosecution as adduced by PW3 and PW5, which will be elaborated in the subsequent issue in this judgment.

The credibility of PW3 and PW5

G **[45]** The learned trial judge finds that the contradiction and discrepancies of the evidence of PW3 and PW5 render the narration of the prosecution's case as being untrue:

(a) the learned trial judge disbelieved the prosecution's story that the police by chance, stumbled on the accused at Farley Commercial Area as H narrated by the prosecution's witness, PW5. The version by the prosecution's witness that the car driven by the accused seemed 'suspicious' which caught their attention as they were patrolling the said area due to it being heavily tinted. The learned trial judge had evaluated the evidence of PW3 and PW5 at great length as to why they thought I that the accused's car was suspicious apart from it being tinted. She finds that it was an afterthought as PW3 when pressed under cross-examination that the matter of the car was being heavily tinted was never pursued and the accused was never queried why his car was heavily tinted. Instead he was checked for drugs and allegedly asked about

incriminating items. PW3 when asked in examination-in-chief as to what he meant by the car being 'suspicious', he said that he saw the accused came out of the car. Hence, by 'suspicious' he meant the accused came out of the car. The car being tinted was never mentioned in the police report P3. The learned judge was of the view that if that was the real reason as to why they confronted the accused, surely it would have appeared in P3, in the opening statement and even in examination-in-chief. When further asked as to why a tinted car was of much concern to the anti-narcotics officer, PW3 said he did not understand the question. Evidently, the fact that the accused's car was stopped, has got nothing to do with the car being tinted. The learned trial judge finds that 'the very unsatisfactory explanation for targeting the Toyota Vios supported the story of the accused that his car was targeted and it was for that reason that PW5 had stopped him and checked his body and the car'. There was also the evidence of PW5 who said in cross-examination that there was nothing suspicious about the car being driven on the material day. Therefore, the learned trial judge finds that a reasonable doubt was raised in the case for the prosecution that it was a chance meeting with the accused as claimed by the prosecution. We find no reason to disturb the learned trial judge's findings in this respect;

(b) the other issue, which is crucial, is whether PW3 was present at the Farley Commercial Area at the material time; the learned trial judge agreed with the defence that PW3 and PW5 made up the story that PW3 was present at that area merely to support their claim that a caution had been administered by a police officer of the rank of Inspector (If the evidence of the accused is to be believed, at the Farley Commercial Area, there were no police personnel of the rank of Inspector which could have administered the caution on the accused, before he allegedly led the police to the Lorong Lada house). This can be seen from the major contradiction in the evidence of PW3 and PW 4 on crucial matters where if it is true that PW3 was at Farley Commercial Area he would not have given contradictory evidence with the evidence of PW5. The material contradictions are:

(i) on the issue of whether the accused tried to escape when he was apprehended by the police. PW3 testified that the accused tried to escape and run away but was controlled by PW5. However PW5, denied that the accused tried to escape and this evidence confirmed the evidence of the accused that he did not try to escape, as he got nothing to fear because he did not do anything wrong. The learned trial judge finds that the fact that PW3 testified to something which the accused and PW3 had said did not occur, showed that PW3 in all probability was never present at the scene;

(ii) secondly, on the question of where the car had stopped at Farley Commercial Area. PW3 said that the car had stopped behind the accused's car but PW5 said that their car stopped in front of the accused's car. PW5 said that if PW3 had testified that the car stopped behind the accused's car then that could not be true;

(iii) thirdly, in relation to the inspection of the car. PW5 contradicted PW3's evidence when he said that he did not check the Vios car whereas PW3 said he did instruct PW5 to check the car. At first PW5 said PW3 did not instruct him to check the car but later he changed his evidence and said that PW3 instructed him to do so. In attempting to explain the change in evidence, he said that he had ignored the instruction. Later he admitted he did check the car; and

(iv) fourthly, PW3 and PW5 also contradicted each other, on who did the body search of the accused at Farley Commercial Area. PW3 said PW5 searched the accused's body on his instruction, but PW5 insisted that it was PW3 who had searched the accused's body.

(c) the accused who had given clear and consistent evidence that there were no other police personnel at Farley Commercial area except PW5, Corporal Philips and Corporal Fareda. He said there was only one police car ie the Preve car and not two as PW3 and PW5 had testified. The accused consistently said that PW3 was never there at Farley Commercial Area at all and only appeared at Lorong Lada;

(d) apart from the inconsistent and contradictory evidence of PW3 and PW5 as to what occurred at Farley Commercial Area, PW3 was often evasive and non-committal coming up with his answers and more often than not he came out with 'I am not sure' or 'I cannot remember' to matters that were impossible for him not to remember (refer to pp 251–252 of *RR Jld* 2). The learned trial judge concluded that the non-committal and evasive answers by the PW3 was because he was not there in the first place and also his fear of committing himself as his answers might be contradicted by subsequent witnesses particularly PW5. The learned trial judge made a finding of fact that in all likelihood PW3 was never there at Farley Commercial Area at the material time;

(e) the other aspect of PW3's evidence is in relation to the number of police cars present at Farley Commercial Area. In examination-in-chief, the evidence suggests that the police party was patrolling in one car as PW3 never mentioned that there were two cars. However, during cross-examination, when it was realised that six police personnel were mentioned, PW3 was compelled to say that there were in fact two police cars and not one. If it is true that there were two police cars patrolling at Farley Commercial Area at the material time, the question that arose was, were the cars following one after the other. PW3 dealt with this

question under cross-examination by saying 'not sure' and 'I cannot remember'. The learned trial Judge finds that such answers tended to show that PW3 was not at Farley Commercial Area because he was never there as the accused had testified;

(f) the learned trial judge also finds that the accused gave unwavering evidence that his wife was asked to drive the car which she did. PW3 gave a non-committal answer of 'I am not sure' during cross-examination. This showed that PW3 was not in the car at that time as he claimed in cross-examination (refer to Q and A 16 at p 257 *RR Jld* 2);

(g) PW5 in his evidence-in-chief said that the accused was driving (p 332 of the *RR Jld* 2A). However during cross-examination, PW5 appeared to say or at least implied that the accused's wife was driving (refer to p 371 at *RR Jld* 2A). The accused in his evidence said that it was his wife who was driving the car, and it was PW5 who directed the accused's wife to take the turning towards Lorong Lada house, not to the house which the accused was staying at the material time. From the cross-examination of PW5, he did ask the accused's wife where she was going to which the wife answered she wanted to go home. If it is true that it was the accused who was driving the car at the material time as alleged by PW5, surely there is no need for PW5 to ask the wife where she was going. Logically, PW5 would have asked the accused instead. The fact that PW5 asked the accused's wife where she was going implied that it was the accused's wife who was driving the car at the material time and not the accused. The fact that PW5 told the accused's wife to turn towards Lorong Lada instead of to Jalan Pipit, which was the original intention of the accused's wife, shows that it was not the accused that led the police to Lorong Lada. Therefore, the prosecution's case that it was the accused who led the police to the discovery of the drugs at Lorong Lada is highly improbable;

(h) PW3 was found to be not consistent in his evidence. During the initial stage of his cross-examination, he testified that the accused did the opening of the gate, entrance door or room door at Lorong Lada house himself without being requested by the police. However, it is to be noted that the keys that was used to open the room to the Lorong Lada house was obtained by PW3 from the bunch of keys in the possession of the wife of the accused. The main door to the house at Lorong Lada was not locked and there were the accused's sister and brother-in-law watching television in the living room when they entered the house. PW3 said that he instructed the accused to open the room at Lorong Lada house; and

(i) there was also the evidence that upon arriving at Lorong Lada house, PW3 went straight to the compound of the house next door which was

not locked. PW3 tried to open the door with the bunch of keys he had taken from the Vios car and tried to open the entrance door. He could not open the door. However, one of the policeman from the Viva car ie Corporal Bahassan informed PW3 that, that was not the house but the house next door. It was only then that the accused's wife took out her bunch of keys and gave it to PW3. It was only then that PW3 and the accused went over to the house next door which is the accused's father-in-law's house. This fact creates doubt that the police had prior knowledge of the house in Lorong Lada without the guidance of the accused. For these reasons, the learned trial judge finds that the evidence of the accused that he was instructed at all time to open the gate, the front door and the room door, was the truth and that PW3's evidence was not true.

[46] Hence, the learned trial judge also finds that the evidence of PW3 and PW5 that the accused opened the drawer on his own volition was likely to be not true. Instead, the accused's evidence that he was instructed to do so by PW3 to be reasonably true.

[47] The findings of the learned trial judge on the credibility of the prosecution witnesses namely PW3 and PW5 are findings of facts premised on the evidence of which she had the audio and visual advantage. We have no reason to disturb her findings in this respect.

[48] The credibility of PW3 and PW5 has an important bearing on the discovery of the drugs at Lorong Lada. The fact that the accused's car was tinted, is to our mind hardly a good reason to detain him and have his body searched for incriminating substances. The contradictions in evidence between PW3 and PW5 creates doubt as to the presence of PW3 at Farley Commercial Area when the caution was allegedly administered on the accused. None of the officers who were present at the material time, except for PW3, were of the rank of Inspector and above, who are not legally qualified to administer the caution. Hence it is crucial for the prosecution to prove that PW3 was at Farley Commercial Area and was the one who administered the caution to the accused, which the prosecution has failed miserably. Even assuming for a moment that PW3 was there at Farley Commercial Area (which the learned trial judge had made a finding that he was not), there was no evidence of the caution being administered on the accused. We do not see any reason to disturb such findings as nowhere has she been shown to be plainly wrong.

[49] The prosecution relies heavily on the evidence of PW3 and PW5 to support its case of information provided by the accused that leads to discovery

of the drugs. With such available evidence from PW3 and PW5 which is riddled with contradictions and inconsistencies in material particulars, the prosecution's case can hardly stand.

There are grave doubts that the accused offered any information to the police that leads to the discovery of the drugs. In fact, the evidence suggests that the police already had prior information as to the presence of the drugs at Lorong Lada the minute they detained the accused at Farley Commercial Area. This is borne out by the following:

(a) PW5 said the accused was driving 'suspiciously' at Farley Commercial Area by the mere fact that his car was tinted;

(b) although nothing was found on the accused person when the police did a body search and nothing was found in his car, the police insisted to go to Lorong Lada house which was not the accused's house;

(c) the accused's wife was told to turn to Lorong Lada (the accused's father-in-law's house) when the accused wife's wanted to turn to Jalan Pipit ie the house where the accused and his wife live; and

(d) Corporal Bolhassan pointed to the house next door (the accused's father-in-law's house) when PW3 wanted to knock on the wrong house at Lorong Lada.

[50] The above evidence suggests that the police had prior knowledge and information and acted on such information prior to them arriving at Farley Commercial Area and targeted on the accused. Clearly, these constituted facts previously discovered by the police from other sources, and certainly not from the accused, and this cannot be regarded as facts discovered under s 27 of the EA. Even if the fact is within the prior knowledge of the police from other sources and when the same information is received again from the accused with the object of making his statement admissible, this cannot be discovery of the fact. The principle of s 27 of the EA is that any statement (that leads to discovery of a fact) in order to be admissible must be made before and not after the discovery. In our case it appears that the statement, if ever it was made to the police officer, was made after the discovery by the police based on whatever information that they were privy to earlier. Hence we find that s 27 of the EA is not applicable in this respect.

Whether the accused had custody and possession of the drugs

[51] It was in evidence that the key to the room in Lorong Lada house was not kept by the accused. PW3 obtained the bunch of keys from the accused's wife. The spare key to the room and to the drawer where the drugs were found was available at the cabinet or chest at the landing on the first floor outside the

rooms. The room and the drawer were accessible to the accused's wife, his siblings in law and to all others living in the house. In fact PW4, the father-in-law of the accused also confirmed this fact.

[52] It was also in evidence that another bunch of keys ie exh D1 was able to open the drawer as demonstrated during cross-examination of PW5, who succeeded in opening the drawer in full view of the court. PW4 said in his testimony that the spare keys including the spare key to that room and to that particular drawer in the room where the drugs were found were kept in the top drawer of a chest at the common area upstairs and all his family members knew of the spare keys there. The keys, being in an open area were accessible to at least all members of PW4's family including his two adolescent sons in their twenties. There is doubt that it was only the accused who had access to the keys to the room and the drawer to the cupboard.

[53] It was the accused's evidence that he does not stay at the room in Lorong Lada as confirmed by PW4, the owner of the house. The accused and his wife stayed at the accused's parents' house at Jalan Pipit. The person having control of that room being the owner is PW4 himself. Obviously, the accused did not have control of that room, least of all custody and control of whatever was in the drawer.

[54] Thus, the prosecution has failed to exclude accessibility by others to the room and the drawer. There is positive evidence from PW4 that others could have access to the room and the drawer as the room was said to be vacant most of the time and the keys were available to at least the other family members. The learned trial judge did not err when she found that the prosecution failed to prove that the accused had exclusive possession of the drugs found in the room given the fact that others had access to the room and the drawer at any time.

CONCLUSION

[55] Therefore looking at the totality of the evidence adduced by the prosecution and the evidence of the accused, the defence has raised reasonable doubt on the prosecution's case that the police had stumbled on the accused by chance at the Farley Commercial Area. The accused had been the target from the very beginning at Farley Commercial area. There was reasonable doubt in the case of the prosecution that the drugs were discovered as a result of information given by the accused. From the facts, it suggests that the police had prior information as to where the drugs were kept and there were doubts that the discovery of the drugs was because of information from the accused. Hence s 27 of the EA does not apply.

[56] The reliance of the prosecution on the evidence of PW3 and PW5 does not help, as their credibility was found to be seriously wanting. There was no proof of caution being properly administered by PW3 on both occasions at Farley Commercial Area and at Lorong Lada house, not to mention that there was a finding by the learned trial Judge that there was also doubt as to the presence of PW3 at Farley Commercial Area when the caution was allegedly administered on the accused before the team proceeded to Lorong Lada.

[57] Apart from doubts that the drugs were discovered as a result of information given by the accused, the evidence showed that the accused did not have custody and control of the drugs which was found in the room at Lorong Lada. The keys to the room and the drawer in which the drugs were found were accessible to others besides the accused. Hence possession was not proven.

[58] The learned trial judge did not err when she finds that the prosecution failed to prove its case against the accused on all four charges beyond reasonable doubt. We hereby dismiss the appeal and affirm the decision of the learned trial judge in the acquittal and discharge of the accused.

Appeal dismissed.

Reported by Afiq Mohamad Noor